LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUN 18 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

CASE NO. 793

HOWARD F. CORAY, Ancillary Administrator of The Estate of William Frank Lucus, Deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PAUL H. RAY
S. J. QUINNEY
Counsel for Respondent

A. H. NEBEKER
Of Counsel

INDEX

SUBJECT INDEX

	Page
SUMMARY	1
STATEMENT OF THE CASE	2
ARGUMENT	4
MRS. LUCUS WAS NOT DAMAGED BY THE DEATH OF FRANK LUCUS	26
CONCLUSION	29

TABLE OF CASES CITED

American Railroad Co. v. Didrickson, 57 L. Ed. 456, 227 U. S. 145	28
Bobango v. Erie R. Co., 57 F. (2d) 667, (1932—C.C.A. 6)	12
Bohme v. Chicago M. & St. Ry. Co., 200 N.W. 804, (Supreme Court of Minnesota. Nov. 21, 1934)	18
Brady v. Southern R. R. Company, 320 U. S. 476, 88 L. Ed. 239	7
Brady v. Terminal R. Association of St. Louis, 303 U. S. 10; 58 S. Ct. 426, 82 L. Ed. 614	10
Deere v. Southern Pacific Company, 123 F. (2d) 438, Certiorari Denied, 314 U. S. 820, 86 L. Ed. 1217	17
Johanna Frese, Admx., v. Chicago Burlington and Quincey Railroad Company, 168 L. Ed. 131, 263 U. S. 1	21
Great Northern Ry. Co. v. Wiles, 60 L. Ed. 732, 240 U. S. 444	20
Helvering v. Gowran, 82 L. Ed. 224, 302 U. S. 238	30
Anna Lang, Admx. v. New York Central Railroad Company, 65 L. Ed. 729, 25 U. S. 455	13
Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 37 Supreme Court 456, 61 L. Ed. 931	10
McCalmont v. Pennsylvania Railway Co., 283 F. 739, (C.C.A. 6)	23
Michigan Central R. Company v. Vreeland, 57 L. Ed. 417, 227 U. S. 59	29
Morse v. Pennsylvania R. Co., 74 F. (2d) 677, (C.C.A. 2)	22
Orton v. Pennsylvania Railway Co., 7 F. (2d) 36, (C.C.A. 6) 1925	11
Peters v. Wabash Ry. Co., 42 S. W. (2d) 588, (Supreme Court of Missouri, 1931)	15
Powell v. Waters, 190 S. E. 615	19
Reetz v. Chicago and E. R. Co., 46 F. (2d) 50, (C.C.A. 6)	20
Reynolds v. New York O. & W. Ry. Co., 42 F. (2nd) 164, (C.C.A. 2)	13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

CASE NO. 793

HOWARD F. CORAY, Ancillary Administrator of The Estate of William Frank Lucus, Deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

SUMMARY

William Frank Lucus, an employee of Southern Pacific Company, died as the result of running a small track car into the rear end of a standing train. He was operating the car east and looking west on a straight, level track. He waited by the side of the main line for the eastbound freight train to pass him and then put the track car on the main line and followed the train east. A nut on a valve in the air line became disconnected which applied all the brakes in the train. The train was traveling 25 to 30 miles per hour and it traveled about 1350 to 1800 feet after the brakes were applied before it stopped.

Lucus had no duties to perform which prevented him from giving his entire attention to the operation of the track car. The track car had a maximum speed of 25 to 30 miles per hour and would stop in 100 feet if the brakes had been applied, which was not done at any time before the collision. There is no doubt that Lucus had plenty of time to stop the track car if he had observed the train stopping. He had plenty of time to stop the track car if he had looked ahead after the train had stopped. He knew he was following the freight train so closely that if it should stop or slow down there would be a collision, unless he also stopped or slowed down. He did not expect the train to stop so he risked his life on the assumption it would not stop or slow down.

The Trial Court directed the verdict for defendant after both sides had rested. The Supreme Court of Utah affirmed. The decision below correctly applied the Federal Law to the facts.

STATEMENT OF THE CASE

May 24, 1944, was a clear, calm, sunny day. (R. 50.) At about 3:30 p. m. Lucus and Lynch put the motor car on the north siding and moved it to the east end of that siding and waited there while the freight train pulled out of the south siding onto the main line and proceeded east. (R. 48.) Lynch was going to replace Lucus as signal maintainer at Lemay. The track was straight and level from Lemay to the place where the collision occured. (See the photographs R. 131, 135.) After the freight train had passed Lucus and Lynch, they pushed the track car 40 or 50 feet and put it on the main track. (R. 49.) Then Lucus got on the north side, which was the operator's side, and Lynch pushed it 20 feet to start it. (R. 49.) They followed the train east. Lynch sat on the south side of the track car. The car was constructed for one man operation (R. 49), and Lucus was the operator. When Lynch hopped on the motor car after starting it, the rear end of the train was then 300 to 400 yards east of the motor car. (R. 50.) Lynch did not look east, but was watching the westbound

semaphore signal east of Lemay to familiarize himself with the territory which he was going to take over. (R. 51.) Lynch did not see what Lucus was doing after they left Lemay (R. 54) and had no conversation with Lucus. (R. 52.) Lynch was not seriously injured in the collision and gave his deposition at the trial. He testified the motor car was not traveling at an excessive speed. (R. 50) The motor car has a one cylinder motor powered for maximum speed of 25 to 30 m.p.h., and is equipped with brakes which would stop it within 100 feet at a maximum speed, and the brakes immediately before the accident were in good condition. (R. 71.) A rule of the defendant company provided that when following moving trains, track cars must remain not less than 400 feet to the rear of the same. (R. 72.) Lucus had no duties to perform on the trip other than to operate the motor car. He was going to deliver some pay checks to employees at stations east of Lemay. (R. 53)

The place of the collision was 3600 feet east of the east switch points at Lemay in Box Elder County, Utah. The deceased was a signal maintainer at Lemay. The tracks at Lemay run east and west and there are passing tracks north and south of the main line. (R. 18, 22.)

The freight train involved was known as first 582, consisting of 82 cars. At Lemay it had taken the south siding, and it pulled back on to the main line and proceeded east at about 3:30 p. m. (R. 21, 22, 50.) As it passed the east switch, Lucus and Lynch, who was with him on the motor car at the time of the accident, were waiting with their car to place it on the main line and follow it east as soon as the train had passed. (R. 48.)

After the train had proceeded a very short distance, the triple union nut on the triple union valve on the 60th car from the head end of the train became disconnected, and the brakes were immediately applied in emergency. The disconnection automatically sets all brakes in the train. (R. 27, 40, 74.) The train was going about 25 miles per hour when the brakes were applied. The train rolled to a smooth, sudden, but easy stop. There weren't any jerks. (R. 28, 39.) It was estimated by Brakeman Agricola,

who was on the caboose, that the train ran between 30 and 40 car lengths after the brakes went into emergency, which was 1350 to 1800 feet. The engine was working steam while the stop was being made, and it was made with no jar whatsoever. (R. 43, 44.) The freight cars in the train were approximately 45 feet in length. (R. 71.) The purpose of the air brakes is to stop the train, and the same kind of stop which occurred on this occasion would occur if the engineer had occasion to set the brakes in emergency. (R. 32.) After the train had come to a stop, Jorgensen, who was the conductor on the caboose, observed that the air gauge on the caboose showed the air pressure had left the line. (R. 23.) After a few seconds, Conductor Jorgensen observed the motor car about 500 feet from the rear of the train and traveling about 35 m.p.h. (R. 24.) Both men on the motor car were looking back toward Lemay (west). (R. 23, 24, 31.) There was no decrease in the speed of the motor car between the time Jorgensen first saw it and when it hit the caboose. (R. 31.) Anderson and Jorgensen on the caboose tried to stop the men on the track car, but could not get them to turn their heads. The collision occurred and Lucus was killed instantly. (R. 23.) Brakeman Law on the caboose also observed that both Lucus and Lynch were traveling east and looking west at the time of the accident. (R. 36.) Emergency stops of trains frequently occur. Engineers stop the train by full application of the air (emergency or "big hole" application) very often if any emergency arises.

ARGUMENT

Petitioner does not contend that Lucus was not negligent or that such negligence was not a proximate cause of his death. No reasonable mind could find that Lucus was exercising any care for his own protection. His conduct is important in the case not because his negligence is a defense if the failure of the air line was the proximate cause of his death, but because his failure to look under the circumstances was so highly extraordinary that it was not to be anticipated by the Respondent. Because of the

conduct of Lucus, the failure of the air line on the train is not the proximate cause of his death.

Brakeman Agricola testified the train took from 1350 to 1800 feet to stop. Its speed was about 25 miles per hour. Assuming a constant rate of deceleration of the train during the time it was stopping, it would average 12½ miles an hour which is 18.33 feet per second. At this rate it would take the train at least 73 seconds to stop. Some seconds elapsed before Jorgensen noticed the track car 500 feet away, approaching at 30 miles per hour, or 44 feet per second. The track car would take 11 seconds to travel the 500 feet and it seems fair to assume 15 seconds elapsed before Jorgensen noticed the track car. This adds up to 99 seconds from the time the brakes went into emergency until the collision, assuming the 1350 feet stopping distance instead of 1800 feet. That is not a long time under some circumstances, but it is a long time to ride backwards immediately behind a moving freight train at 30 miles an hour without looking ahead or slowing or stopping the track car.

It does not in any way justify the conduct of Lucus to say it was only a matter of seconds between the time the brakes were applied on the train until the collision occurred. If the time was short the duty was that much more imperative. If it had been a fact known to Lucus that there was no train on the track between Lemay and Newfoundland, the next station to the east, his failure to look might be understandable. If instead of running into the train he had run into a rock which had just rolled onto the track or some other object he had no reason to anticipate would be on the track, when he thought he had a clear track ahead, his conduct might be within the field where the railroad should anticipate he might act as he did. But Lucus knew he was following the train within 300 or 400 yards at 30 miles per hour. If he wanted for some reason to look back at Lemay, this was not a job which was so exacting upon either his time or attention that it precluded him from turning his head occasionally to see if there was a clear track ahead. If he wanted to

be free of the obligation to look ahead often enough to insure he would not run into the train if it stopped or slowed down, he could easily have slowed or stopped his motor car. No train was following him. He had a choice of slowing his car or stopping, or looking ahead to know how much clear distance he had. It was highly extraordinary that he could resist the impulse to look where he was going.

He knew the train was 300 to 400 yards ahead of him when he left Lemay. He was in exclusive control of the track car. If he had looked east while the train was traveling the distance it took to stop after the brakes went into emergency, he could have observed the gap between his car and the end of the train was closing. The Petitioner makes no contention that Lucus was not negligent in running into the rear end of a train stopped on a level straight track on a clear sunny day when he knew the train was traveling 300 or 400 yards ahead of him.

It would not be contended by Petitioner that if Respondent had stopped its train for any one of many reasons other than the reason this train stopped and Lucus had run his track car into the train, he could recover. Suppose the train had stopped by emergency application of the brakes because of another track car or train or engine on the track. Liability to Lucus would not be claimed. But Petitioner claims that merely because of the *reason or occasion* of the stop, to wit, a disconnected air line—there is liability. Petitioner's contention is not based on the nature or any suddenness of the stop, but says that because it was occasioned by the disconnection of the air line there is liability. Apparently, Petitioner's legal position would be the same if the train had been stopped for an hour instead of a few minutes.

No claim or suggestion is made by Petitioner that Respondent did not have the unconditional right to stop its train at any time and place without owing the operator of a track car following the train the duty of any warning or lookout. When the train stops, it must necessarily remain on the track until moved again. There is no analogy

between a freight train on the track and a motor vehicle which is parked on the traveled portion of a highway. If the train had slowed down to 10 or 15 miles per hour and Lucus had continued going east at 30 miles per hour while looking west, the collision would have happened when he overtook the train. Lucus had no duties to perform which required him to look backward. His only duty was to deliver some checks to employees.

It is the contention of Respondent that there was no causal connection between the disconnection of the air line and the death of Lucus.

This Court had occasion to discuss and apply the rules of proximate cause in *Brady v. Southern Railway Company*, 320 U. S. 476, 88 L. Ed. 239. The deceased railway employee was killed in a switching movement when a car on which he was riding ran over a derailer and threw him under the wheels. Plaintiff relied upon negligence in not putting a light on the derailer and that some employee other than deceased closed the derailer. The Court held the evidence on these contentions was not sufficient to take the case to the jury.

The plaintiff also relied upon testimony that the rail opposite the derailer was defective and permitted the derailing of the car when that would not have occurred but for the defect. The Court holds the defendant was not required in the exercise of due care to anticipate that the crew would improperly back the train over the closed derailer.

> "We now turn to the third instance of alleged negligence. This is the existence to the knowledge of the carrier of a rail, opposite the derailer, so worn on top and sides that in the opinion of qualified experts it permitted the thrust of the east wheels of the car, as they rose over the 'wrong end' of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, 'nine times out of ten, if the best type' rail was in use. There is no evidence

of the unsuitability of the rail for ordinary use."

"Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer a danger reasonably to be anticipated. As to the likelihood of cars passing over the wrong end of derailers, one witness with ten years' experience as a brakeman testified that he recalled three or four instances. Another, the Superintendent of the railroad with 22 years' experience said, 'It happens very frequently. I would say yes, I have seen it 25 to 50 times.' The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. Ed. 896, 50 S. Ct. 281; St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 348, 70 L. Ed. 979, 983, 46 S. Ct. 520; New York C. R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; Baltimore & O. R. Co. v. Tindall (CCA 7th) 47 F. (2d) 19; Texas Gulf Sulphur Co. v. Portland Gas Light Co. (CAA 1st) 57 F. (2d) 801. Cf. Story Parchment Co. v. Paterson Parchment Co., 282 U. S. 555, 566, 75 L. Ed. 544, 550, 51 S. Ct. 248.

"The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, at 475, 24 L. Ed. 256, at 259:

"'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

> "Events too remote to require reasonable prevision need not be anticipated. * * *"

The test of a danger "reasonably to be anticipated" as stated in the Brady case is a rule announced by all of the cases which analyze the doctrine of proximate cause. Petitioner at page 21 of his brief states:

> "* * * Unless the distance separating the track car and the rear of the train was sufficient for Lucus to stop the track car, a collision was made inevitable by the stop, and even if the distance was sufficient the danger was ever present that he would not discover the stalled train in time."

There is no evidence that the distance separating the track car and the rear of the train was not sufficient for Lucus to stop the track car if he had looked. The evidence is uncontradicted that the track car could be stopped in 100 feet going at maximum speed. The brakes were in good condition. The train moved at least 1350 feet after the brakes were applied. The evidence is uncontradicted that after the train had stopped Lucus still had more than five times the distance necessary to stop the track car if he had not insisted on riding backwards. The evidence is without dispute that Lucus could have stopped if he had looked where he was going and that he did not turn his head. The inquiry here narrows to the question under the rule of "reasonably to be anticipated": Was the defendant required to anticipate that Lucus would not keep any lookout ahead? We respectfully submit that no case relied on by Petitioner answers this question in his favor.

At page 19, of Petitioner's brief it is stated:

> "The Utah court's resurrection of the absolute defense of contributory negligence by calling such conduct the 'legal cause' is contrary to every Federal authority petitioner has been able to discover. The phrases 'legal cause' and 'proximate cause' are foreign to the Federal Acts in question; neither phrase is used in any section of the acts. They are

used and employed by the Utah court to obscure reason and justify a result not otherwise obtainable."

But Petitioner's brief quotes from opinions of this Court which use the phrase "proximate cause of injury" in cases under the Safety Appliance Act. The criticized phrase is found at the bottom of page 15 of Petitioner's brief in the quotation from *Louisville & Nashville R. Co. v. Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931:

> "This effect can be given to the acts and their wise and humane purposes can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the *proximate cause* of the injury to them when engaged in the discharge of duty." (Italics ours.)

And Petitioner's brief at pages 16 and 17 quotes from *Brady v. Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614, in part:

> "* * * The Statute has been liberally construed so as to give a right of recovery for every injury the *proximate cause* of which was a failure to comply with a requirement of the act. * * * One can recover if the failure to comply with the requirements of the act is a *proximate cause of the act* resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." (Italics ours.)

The Utah court did not hold that contributory negligence of Lucus was an absolute defense. It held that the failure of the air line which stopped the train was not a proximate cause of the death of Lucus. The cases from this court upon which Petitioner relies hold the test of liability is the test of proximate cause. We agree that such is the law. It is our position that the failure of the air line was not a proximate cause of the death. The Restatement of

the Law quoted by the Utah court is the source of the phrase "legal cause" which obviously means the same as "proximate cause."

A clear and logical discussion of the rule of proximate cause is found in *Orton v. Pennsylvania R. Co.*, 7 F. (2d) 36, (C.C.A. 6) 1925. Ohio had a statute making it a misdemeanor for a railroad company unnecessarily to obstruct a public highway by permitting cars to remain across it for more than five minutes. There was evidence showing it had obstructed the country crossing in question for 20 to 30 minutes. Plaintiff was a guest in a car driven 25 or 30 miles an hour along the highway and into the side of the train. The road was straight and the accident happened about 9:00 o'clock at night. The court assumed the railroad was negligent and held such negligence was merely an incident and not a concurring proximate cause of the accident.

> "* * * A case in point is Gilman v. Central Vermont Ry., 93 Vt. 340, 107 A. 122, 16 A. L. R. 1102, in which it was held that the action of a railroad in obstructing a crossing for an unlawful length of time, in violation of a statute, was merely a condition and not the proximate cause of an injury resulting from a collision with the cars. See, also, Gage v. Boston & Maine Railroad, 77 N. H. 289, 90 A. 855, L. R. A. 1915A, 363; Trask v. Boston & Maine Railroad, 219 Mass. 410, 106 N. E. 1022. These cases, we think, illustrate the distinction between actionable negligence and a fortuitous circumstance too remote to be regarded as a concurring proximate cause of an injury. That the collision would not have occurred had the cars not have been permitted to remain across the highway is beside the question of casual connection. Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729; McCalmont v. Pennsylvania R. Co. (6 C.C.A.) 283 F. 736. The most that can be said for plaintiff is that defendant created a situation in which Inman's negligence operated to bring about the collision, which would have been true if the train had occupied the crossing only while pass-

> ing over it. Defendant's act was merely a condition and in no sense a concurring proximate cause of the injury."

In *Bobango v. Erie R. Co.*, 57 F. 2d 667, (1932 - C.C.A. 6) the court sustained a directed verdict for defendant. Plaintiff was a surveyor employed by the railroad and a member of his crew had left his rod upon the track. Plaintiff discovered its location as a train was approaching and in attempting to remove it he was struck by the train and injured. It is not claimed that the train crew was at fault. The contention is that the employee who left the rod on the track was negligent, and that whether his negligence was the proximate cause of the injury was a question for the jury. The court took the view that the injury was not proximately caused by the negligent act of the employee. "It could not reasonably have been expected that plaintiff, in the situation in which he found himself, would undertake to remove it." The suit was brought under the Federal Employers' Liability Act. Contributory negligence was no defense except to diminish the damage.

> "* * * While the rule of proximate cause does not require an anticipation of the precise injuries received, it is generally held that before there can be a finding of such cause it must be made to appear that the injury was a natural and direct consequence of the negligent act or, as sometimes stated, a consequence that ought to have been foreseen in the light of all the attending circumstances. * * *"

It could not reasonably have been expected that Lucus would operate his track car blindly into the standing train. There is nothing in the record to show that there was anything in the nature of either duty or interest to divert his attention from his task of operating the car. It would seem that the impulse or instinct to look where he was going would cause the expenditure of the slight time and effort required to turn his head and glance along the track.

In *Reynolds v. New York O. & W. Ry. Co.*, 42 F. (2d) 164, (C.C.A. 2), a collision occurred between a passenger train which was backing up on a curved track through embankments and a track motor car carrying four section men. The train had passed a flag station and was backing up a short distance to let off a passenger at the station. The track car finally reached a speed of 20 miles an hour and the men on it did not see the train because their backs were turned toward the direction from which the train was coming. Eastwood was operating the track car and the plaintiff's intestate was Reynolds. The train was either stopped or moving very slowly, when the collision occurred. The flagman on the train did not go back when the train stopped (before backing) and the violation of the rule relating to flagging a stopped train was the negligence alleged.

The court held the flagging rule does not relate to a track car and is not intended for the protection of its occupants. It is not a train. It could be stopped in 30 feet when going at a high speed. There was no duty to warn the men on the track car and negligence was not shown by failure to warn. Judgment for plaintiff was reversed.

In *Anna Lang, admx. v. New York Central Railroad Company*, 65 L. Ed. 729, 255 U. S. 455, the action was under the Safety Appliance Act. The defendant had a defective car loaded with iron on the siding at the station in Silver Creek, New York. The drawbar, the draft timber, and the coupling apparatus on the westerly end of this car were gone. This condition was known to the plaintiff's intestate prior to the accident. During a switching movement involving connecting three cars on the track where the crippled car stood, plaintiff's intestate was on one of these three cars for the purpose of setting the brakes and so placing them on this siding as not to come into contact with the crippled car. He went to the east end of the easterly car (on top) and his foot was resting on a small platform at the end of the car which is below the brake wheel. For some reason he did not stop the three cars moving on this track before coming into contact with the

crippled car. The cars collided and owing to the absence of coupler attached on the crippled car, intestate's leg was caught between the ends of the two cars and he was so injured that he died. It was not the intention of any of the crew to disturb or couple or to move the crippled car. The defendant railroad contended and the Court held, that the proximate cause of the accident was the failure of the deceased to stop the cars before they came into collision with the defective car, and that the absence of the coupler and drawbar was not a proximate cause or a concurring cause.

> "It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car ,and to set the brakes upon it 'so as not to come into contact with the crippled car,' to quote again from the trial court. That duty he failed to perform, and if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the court of appeals answered: 'Still the collision was not the proximate result of the defect.' Or, in other words, and as expressed in effect in the Conarty Case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law, 'but only had they been complied with, if (the collision) would not have resulted in the injury to the deceased.'"

In *St. Louis & San Francisco Railroad Company v. Fannie M. Conarty, admx.*, 59 L. Ed. 1290, 238 U. S. 242, it appeared that the deceased was killed in a collision between a switch engine and a loaded freight car having no coupling or drawbar at one end, these having been pulled out while the car was in transit. The car was about to be placed on an isolated track for repair. The deceased and two companions were standing on the footboard on the front of the switch engine, and when the car was observed, his companions stepped to the ground on either side of the track, while he remained on the footboard and was caught between the engine and the car at the end from

which the coupler and drawbar was missing. These appliances had they been in place would have kept the engine and the body of the car sufficiently apart to have prevented the injury. The deceased and his companions were not intending to and did not attempt to couple the defective car to the engine or handle it in any way. The court said that the principal question in the case was whether at the time he was injured the deceased was within the *class* of persons for whose benefit the Safety Appliance Act required automatic couplers and drawbars. The court points out that the purpose of the act relating to drawbars and automatic couplers is to enable the car to be coupled or uncoupled "without the necessity of men going between the ends of the cars."

> "* * * Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.'
>
> "We are of the opinion that the deceased, who was not (251) endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the state erred in concluding that the safety appliance acts required it to hold otherwise."

In *Peters v. Wabash Ry. Co.*, 42 S. W. (2d) 588, (Supreme Court of Missouri, 1931) the action was under the Safety Appliance Act alleging the defendant used cars in interstate commerce not equipped with automatic couplers, which would couple upon impact. It was admitted that there was sufficient showing of the violation of the act. The defendant on appeal urged that the violation of the act was not the proximate cause of Peters' death. It appeared that Peters had made two attempts by giving the

necessary signal during the switching operation to have the cars involved coupled by impact. The accident happened at 11:00 at night and signals were being given by lantern. Finally on a third attempt, and after the unsuccessful attempts had moved the cars so that they were adjacent to a loading dock, the third attempt to couple the cars was successful. Immediately after the cars came together, Peters was on the ground either at the end or between those two cars giving a "kick" signal which was relayed to the engineer who then pushed the whole string of cars 50 or 60 feet further south. About ten minutes later Peters was found dead, crushed between the platform and the side of a car. There was evidence that he had been dragged or pushed along the side of the platform. The court held that the defect in the coupler was not the proximate cause of the death and did not contribute to cause the movement of the cars that killed him.

> "He was not killed while engaged in the coupling movement. It does not appear whether or not, prior to giving the third back up signal, he had gone between the ends of the cars to adjust the coupling, but we do not regard it as material whether he had or not. In either event, the coupling had been effected, that movement completed, and he was still uninjured, and but for his own act which brought about the further, and to him fatal, movement of the train would have been in safety. Had he, when the coupling was completed, climbed upon the platform, which was free of obstruction, or otherwise extricated himself from his then position before giving the kick signal he would not have been hurt. The movement of the engine and cars was under his control, and he was experienced in such work, and familiar with the environment. Keating testified that it was customary in such work to relay without question whatever signals were given by the switchman in charge of the movement if he was an experienced man, as Peters was. Clearly Peters' own negligent act constituted an efficient independ-

ent cause intervening between defendant's negligence and the injury complained of, but for which the accident would not have happened, and was the proximate cause of his death."

Deere v. Southern Pacific Company, 123 F. (2d) 438, Certiorari denied 315 U. S. 820, 86 L. Ed. 1217 was an action under the Federal Liability Act for the death of a signalman who was killed when a train collided with his inspection car which he was attempting to remove from the track. A judgment directing a verdict for defendant was affirmed on appeal. The court held that the signalman had the duty of removing the car from the track so that the approaching train might pass, and that he could not expect the trains to stop for him. The duty follows from the nature of such employment. Self-preservation has to rest on them because no adequate protection other than self-protection can be afforded them. One alleged ground of negligence was the failure of the company to furnish sufficient help on the maintenance car to permit it to be removed quickly from the track. Upon this point the court held that even if the failure to provide additional help was negligent, it was not the proximate cause of the injury:

"• • •

"But if it be conceded, arguendo, that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of plaintiff's decedent. His death was not owing directly to the act of removing the speeder, but was due proximately to his failure to step aside from the path of the train, the approach of which was fully known to him, as is evidenced by the fact that he had begun to remove the speeder from the way of the train. He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances reasonable men must agree that the accident was not brought about through any failure to furnish

sufficient help, and there is therefore no question for the jury on this point. * * *"

Bohme v. Chicago M. & St. Ry. Co., 200 N. W. 804, (Supreme Court of Minnesota. Nov. 21, 1924). Plaintiff was a rear brakeman and as the train was moving slowly, he heard the brakes squealing on the second car in front of the caboose and knew that they were sticking. It was in the night and dark and cloudy. He started down the ladder on the side of the front end of the car for the purpose of bleeding the brake. He looked down and saw a dark bank which he took to be the ground. Without lowering his lantern to see what was beneath him, he stepped off the ladder and fell through a bridge over which the train was passing and was seriously injured. The action was under the Safety Appliance Act. The sole question presented was whether the defective brake was the proximate cause of the injury within the purview of the federal act. The court reviews many cases and concludes that the action of the trial court in rendering judgment for defendant notwithstanding verdict for plaintiff was correct.

"Applying to the present case the test announced and applied in the cases cited makes it clear that the defect in the brake was not the proximate cause of the accident which resulted in plaintiff's injury. He had not entered upon the work of remedying the defect. While the defect furnished the occasion for him to go along the top of the cars, it did not produce the condition, nor bring into operation a force, which caused him to fall. It caused no movement of the train, no jar or jerk. If plaintiff had alighted in the same manner at the same place for the purpose of boarding the caboose as it passed, or for any other purpose, the result would have been the same. The condition of the brake had no direct causal connection with the fact that he 'stepped out into space,' as he termed it, instead of on the ground. As pointed out in the above cases the statute does not make the company an insurer of the safety of its employees against all accidents, but only against

those resulting proximately from a failure to comply with its requirements. Where an employee, while on his way to adjust a defective appliance, or while returning from making such an adjustment, meets with an accident from another independent cause, the Safety Appliance Act has no application.

"It follows that the learned trial court reached the correct conclusion, and that the judgment must be, and is, affirmed."

In *Powell v. Waters*, 190 S. E. 615, the action was brought under the F. E. L. A. and the Safety Appliance Law. The deceased was an engineer on a train in Georgia, and on a hot afternoon the air pump which was part of the brake system became stuck because of its faulty condition, thus rendering the system of air brakes useless. The deceased worked on the pump in the heat for about an hour and then assisted in bleeding the air out of the train in order to continue and then ran the train into Savannah at a low rate of speed because there were no brakes. On arrival at Savannah, his condition was critical and the defendant's doctor was called, but the deceased died at 7:00 that evening. The court held the defective air pump was not the cause, but a mere condition, and held that the lower court erred in overruling the general demurrer to the petition. The following syllabus is by the court:

"1. In an action against a railroad company for injury to one of its employees based on the defendant's violation of a federal statute, in order to render the company liable there must necessarily be, as in other cases, a causal connection between such violation and the injury. (a) 'The most generally accepted theory of causation is that of natural and probable consequences (Mayor, etc. of Macon v. Dykes, 103 Ga. 847, 848, 31 S. E. 443); and in order to hold the defendant liable the petition must show either that the act complained of was the sole occasion of the injury, or that it put in operation other causal forces, such as were the direct, natural, and probable consequences of the original act, or that

the intervening agency could have reasonably been anticipated or foreseen by the original wrongdoer.' Rome Railway, etc. Co. v. Jones, 33 Ga. App. 617, 618, 127 S. E. 786.

"(b) An employee of a railroad company cannot recover under the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., if the failure to comply with its requirements is not the proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation, in which the accident, otherwise caused, results in such injury."

The following headnotes from *Reetz v. Chicago & E. R. Co.*, 46 F. (2d) 50 (C.C.A. 6) reflect the facts involved and the holding of the court:

"Railroad held not liable for freight conductor's death for failure to provide footpath and guard railings along bridge abutment.

"Deceased fell from bridge while endeavoring to locate place in train where breaking of couplers and drawbars had broken air line and brought train to stop. However, record did not show railway negligent in method of constructing bridge or in maintaining it, and there was no evidence that guard railings or footpaths were used in open country nor that their absence was proximate cause of injury.

"Railway operating train with defective couplers and drawbars held not liable under statute for freight conductor's death, which was not proximate result thereof (Safety Appliance Act. (45 USCA Secs. 1-16.))"

This Court in *Great Northern Ry. Co. v. Wiles*, 60 L. Ed. 732, 240 U. S. 444, held there could be no recovery for the death of a brakeman on the caboose of a train which broke in two because the drawbar pulled out and stopped the train instantly. Another train following ran into the

caboose because the deceased failed to perform his duty to immediately put out signals to protect the stopped train as required by rule. The Minnesota court held the doctrine of res ipsa loquitur applied from the pulling out of the drawbar and submitted the case to the jury on the theory of comparative negligence.

> "There is no room for the application of the rule of comparative negligence established by the employers' liability act of April 22, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier's rules required, remained in the caboose and was killed there when a passenger train, which he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run."

This Court, in *Johanna Frese, admx. v. Chicago Burlington and Quincy Railroad Company*, 68 L. Ed. 131, 263 U. S. 1, held plaintiff could not recover for an injury due "primarily" to the failure of the deceased to act. Frese was the engineer on a Burlington train which collided with a Wabash train at a crossing of the tracks on the same level. A statute of Illinois made it the duty of the engineer to stop within 800 feet and positively ascertain that the way is clear. The Wabash train was approaching (after both trains had stopped for the crossing) from the Burlington fireman's side of the engine and the plaintiff alleged negligence of the fireman. The court pointed out the statute made it the personal duty of the engineer to ascertain that it was safe to resume the course.

> "The plaintiff contends that there was evidence of contributory negligence on the part of the fire-

man, Savage, and therefore, even if Frese was negligent, that would not be a bar to the action under the Employers' Liability Act. But the only evidence as to the fireman came from a man who was standing on the ground as the engine passed him. He says that it looked to him that the fireman then was looking through the front window at that time, and that he continued in that position up to say 50 or 60 feet from the crossing of the tracks. The fireman was on the left, on the side of the other approaching train; the engineer on the right, where he could not see so well. But of course the witness could not testify which way the fireman turned his eyes after he saw only his back, and it is a mere speculation to argue that Savage did not do all that he could. Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act (April 22, 1908, chap. 149, Sec. 3, 35 Stat. at L. 65, 66, Comp. Stat. Sec. 8659, 8 Fed. Stat. Anno. 2d ed. p. 1339) to hold that he could recover for an injury primarily due to his failure to act as required on the ground that possibly the injury might have been prevented if his subordinate had done more. See Great Northern R. Co. v. Wiles, 240 (4) U. S. 444, 448, 60 L. Ed. 732, 734, 36 Sup. Ct. Rep. 406. * * *"

While the court did not give a name to the legal rule it applied, we submit the court, applying common sense to the facts, was of the opinion the negligence of the engineer was the proximate cause since he had the primary duty. In the phrase of that case, it would be a perversion of the Federal Act to hold that Lucus could recover for an injury primarily due to his failure to act.

Morse v. Pennsylvania R. Co., 74 F. (2d) 677, (C.C.A. 2), reports a decision in a F. E. L. A. case by Augustus N. Hand, Circuit Judge. The plaintiff was a signal main-

tainer riding along the track on the track car. It became stalled on a highway crossing by cinders in flangeways of the rails just as a motorist named Jensen approached the crossing. As the two vehicles struck, plaintiff jumped and broke his leg. The court held the cinders in the flangeways were a condition rather than a cause of the accident:

> "Jensen not only should have seen the track car long before he did, but should have had such control over his automobile, even when so short a distance away from the track car as 16 feet, that he could avoid a collision. We can see nothing that prevented him from exercising such control, even up to the last moment, and we hold that his negligence in running the Ford coupe into the plaintiff's car was the proximate cause of the latter's injuries. Instead of waiting for the track car to get beyond and to the south of the highway, Jensen relied on passing over the rails the moment the track car would naturally, in view of apparent probabilities, have got beyond the crossing. He would have been fully as justified in taking his chances if the plaintiff had deliberately stopped the track car at the crossing in order to do some work there as he was when it suddenly became stalled. The stopping of a car on a railroad track, whether voluntary or involuntary, cannot be regarded as an act of negligence.
>
> "Any defect in the crossing, due to the presence of too large a mass of fine cinders or to the failure to clean out the flangeways so that they would not become clogged and endanger traffic, we regard as a condition rather than a cause of the accident."

In view of Petitioner's reliance upon the Gotschall case (244 U. S. 66) and the Layton case (243 U. S. 617) and Respondent's reliance upon the Conarty, Lang and Wiles cases (supra) it is interesting for this court to examine *McCalmont v. Pennsylvania R. Co.*, 283 F. 739, (C.C.A. 6) where all of these cases are discussed and shown to not be

in conflict. McCalmont was injured while shortening a chain on a car with a defective coupler, standing with others on a dead track used to assemble cars in need of repairs. While thus engaged, he failed to set out a blue flag (required by rule) to indicate to others that he was working under or about the car and to prevent it being coupled or moved. Another car was kicked onto the same track, hit the car on which McCalmont was working and he was killed. The action was under the Safety Appliance Act. The defense was that the defective coupler was not the proximate cause of the death. The action of the trial court directing a verdict for defendant was affirmed.

> "If, however, there were otherwise doubt about the conclusion that the defective coupler was not the proximate cause of McCalmont's death, it would be removed by observing and applying the ruling of the Supreme Court in the Wiles Case, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732. This opinion points out that even in the presence of negligence by defendant which set in motion the train of events and without which the injury would not have happened, yet the plaintiff's own conduct and negligence may be such as to become the intervening and sole proximate cause, leaving the defendant's negligence as a remote cause only. Upon its facts as they are assumed by the Supreme Court, we cannot distinguish that case from this. It is true that the right to recover was not planted upon the Safety Appliance Act, but upon negligence under the Employers' Liability Act, and that any contributory negligence on the plaintiff's part would have diminished the recovery under the Employers' Liability Act (Comp. St. Secs. 8657-8665) rather than have been wholly immaterial under the Safety Appliance Act; *but the court was not deciding the effect of contributory negligence, but only whether the plaintiff's conduct was contributory negligence or was the sole proximate cause.* It could make no difference whether the defendant's negligence in

permitting the train to break apart and thus bring Wiles into a place where he was in danger and was killed, was a disputed inference which a jury might draw under the one act, or a presumption of law which must be indulged under the other act. The Supreme Court assumed (240 U. S. 448, 36 Sup. Ct. 408, 60 L. Ed. 732) that there might be negligence, actionable under the Employers' Liability Act, which thus brought Wiles into the position where he was exposed to the danger of an unintended collision, just as the absence of the necessary coupler brought McCalmont into a similar position. Wiles knew, as McCalmont did, that in the regular and ordinary operation of the road such a collision as did take place was liable to occur at any moment. It was Wiles' clear duty, as it was McCalmont's, to take a certain prescribed step which, if taken, would prevent the collision. In each case there was neither negligence in bringing about the collision nor cause for the collision, except the failure of the man hurt to take that step which it was his duty to take to protect himself and others. If Wiles had gone back with his flag, as his duty required, that collision probably might have been avoided. If McCalmont had set out his flag as his duty required, it is even more probable that there would have been no collision. Our affirmance of the judgment below could safely be rested on the Wiles Case alone."

Plaintiff relies upon *Spokane and Inland Empire Railroad Company v. Edgar E. Campbell,* 60 L. Ed. 1125, 241 U. S. 497. There Campbell moved the electric train westbound from Coer d'Alene when he discovered an eastbound train approaching on the same track. The airbrakes on Campbell's train failed to work properly and a collision resulted. Of course, it could be reasonably foreseen that if the air brakes were defective that might cause a collision with anything on the track including an approaching train. The Campbell case would suport a claim that if the brakes on the *track car* failed to operate (if Lucus applied them, which he did not) and a collision resulted for this reason

there would be causal connection between the faulty brakes and the collision. The case gives no support to the contention that there is any causal connection under the entirely different facts in the case at bar.

The Respondent would not be liable if the stop had been caused by the engineer applying the air because it is not reasonably to be anticipated that the operator of the track car would fail to see the train stopped on the track. It is for the same reason that the disconnection of the air line is not the proximate cause of the rear end collision.

Mrs. Lucus Was Not Damaged by the Death of William Frank Lucus.

Upon the trial of this case it was undisputed that the deceased and his wife were not living together at the time of the death and had not lived together for approximately two years prior thereto. (R. 57-59) During this period, he had furnished her no support whatever. (R. 58-59, 109) She had been employed ever since they were married on December 26, 1936. (R. 55) There were no children, and as shown by defendant's Exhibit 4, on March 18, 1943, when Frank Lucus applied for employment, he stated in his application "Am supporting no one." (R. 142-B) There was also introduced in the trial court as defendant's Exhibit 1, a transcript of divorce proceedings in the Superior Court of California in and for the County of Los Angeles in the case entitled Wm. Frank Lucus vs. Edith N. Lucus. That record shows that on August 27, 1942, the deceased filed an action against his wife for divorce, alleging

> "That since the date of said marriage, the defendant has treated plaintiff in a cruel and inhuman manner, and has wrongfully inflicted upon him grievous suffering, pain and anguish; that all of said acts and conduct of said defendant were without excuse, cause or provocation, and caused plaintiff to suffer shame, embarrassment and humiliation,

and caused him to become ill in mind and body, and impaired his health and happiness." (R. 105)

Mrs. Lucus, thereafter on September 15, 1942, filed a cross complaint for separate maintenance, in which she stated under oath:

"That plaintiff deserted and abandoned defendant more than a year prior to the commencement of his action and lived separate and apart from the defendant against the will and wishes of the defendant; that during all of said time said plaintiff did not contribute anything to the support of defendant and did not supply her with the necessities of life; that during the entire married life of the parties the defendant has been forced to work and earn her livelihood and necessities of life; that plaintiff has always earned more than enough money to support defendant but has failed, neglected and refused so to do; all of which has been do to no fault of the defendant.

"That plaintiff squanders his money on liquor, in bars and on friends and acquaintances with whom he associates with at public drinking places, constantly drinking to excess.

"That defendant has pleaded and begged plaintiff to give up his disreputable friends, to cease patronizing public bars and to return home and live with defendant; that plaintiff has persistently refused to do so; that due to his excessive drinking, plaintiff has become, in the past, involved in several grievous difficulties, from which defendant was able to extricate him only after great and costly effort; that due to plaintiff's conduct, defendant worries about him and is in constant dread that he will again become involved in difficulties; that her worry has been so great that it has affected her health and she cannot sleep or rest properly, has lost her appetite and is almost physically exhausted; that she is in need of medical attention and cannot afford to

> pay for it; that she fears that she may have to quit her job because of her health; that unless she receives financial aid from plaintiff she will suffer to a great extent." (R. 109)

It further appears from the record that among other proceedings resulting from this divorce litigation Frank Lucus was ordered on January 6, 1943, to pay his wife $10.00 per week for her support commencing February 1, 1943. (R. 127) Shortly after this order was entered, Frank Lucus left Los Angeles without paying anything to his wife on account of the order or otherwise, and on March 18, of that year started to work for the Southern Pacific Company in the State of Utah. (R. 59, 142-B) The testimony in the record shows that there was nothing left of the marriage relation between Frank Lucus and Edith Lucus except the bare technicality that the divorce had not been granted. He left the State of California obviously for the purpose of defeating her intention of making him pay her support money. He was 39 when he died and she was 49. (R. 54-55) Her only hope of future support was legal duress of a spouse who was determined not to pay. She had alleged under oath that his society and association was destroying her health. To permit a jury under these circumstances to return any judgment for the wife would result in a verdict based on pure speculation and conjecture. If a jury had found that based on the bare possibility that in spite of the overwhelming evidence to the contrary at some time in the future there might have been a reconciliation of these parties, such a finding would not be supported by any testimony, but would be based on pure guess work, and contrary to all the evidence.

The rule of damages in cases under the act has been clearly announced by the Supreme Court. In *American Railroad Co. v. Didrickson*, 57 L. Ed. 456, 227 U. S. 145, the court said:

> "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by

> the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."

Michigan Central R. Co. v. Vreeland, 57 L. Ed. 417, 227 U. S. 59, involved a widow's action for the death of her husband. The court held:

> "The financial benefit which might reasonably be expected from her husband in a pecuniary way is the measure of damages in an action brought against an interstate railroad carrier under the employers liability act of April 22, 1908, for the benefit of the widow of an employee killed while engaged in interstate commerce."

Mere status of husband and wife followed by the death of the husband does not show pecuniary loss. In addition to the status there must be a reasonable expectation of future support and maintenance. This essential was totally absent in this case.

The record made in the trial court would seem to require the conclusion that Lucus died not at all because the train came to a stop, but only because Lucus, knowing the train was ahead of him, persisted in riding backwards with no thought or care for his own safety, until he propelled the little track car at unchecked speed into the caboose. Likewise, the conclusion seems to be required by the record as a matter of law that Lucus' death resulted in no pecuniary loss to Mrs. Lucus. By her sworn statement in the California divorce case, Lucus contributed nothing to her support while they lived together. By her testimony upon the trial below, Lucus made no contribution to her while he lived in Utah and worked for Respondent. So clear was it in the mind of Mrs. Lucus, that she had no fair hope of recovering financial help from Lucus, she did not even make a good faith effort to discover his whereabouts or communicate with him during the fourteen months he worked for Respondent.

The result in the trial court and in the Supreme Court of Utah was clearly correct and resulted in justice between

the parties. Petitioner has been unable to point to any fact which would justify a finding of any causal connection between the stopping of the train and the death of Lucus. Neither has he been able to point out any basis for a finding that Mrs. Lucus suffered any pecuniary loss by Lucus' death. No claim was ever made by the administrator that anyone other than Mrs. Lucus was dependent upon Lucus.

Petitioner complains here of the language employed by the Supreme Court of Utah. We submit that not only did the Supreme Court of Utah correctly decide the case, but that the reasons assigned for its decision are sound. But, the case having been properly decided, the reasons for the decision are immaterial upon review and cannot be the basis for reversal.

This Court has stated the rule applicable here in *Helvering v. Gowran*, 82 L. Ed. 224, 302 U. S. 238:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co. 256 U. S. 208, 65 L. Ed. 892, 41 S. Ct. 451; United States v. American R. Exp. Co. 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560; United States v. Holt State Bank, 270 U. S. 49, 56, 70 L. Ed. 465, 469, 46 S. Ct. 197; Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; Stelos Co. v. Hosiery Motor-Mend Corp. 295 U. S. 237, 239, 79 L. Ed. 1414, 1416, 55 S. Ct. 746; cf. United States v. Williams, 278 U. S. 255, 73 L. Ed. 314, 49 S. Ct. 97. * * *"

Conclusion

The decision of the Supreme Court of Utah correctly holds, in harmony with the decisions of this Court, that the death of Lucus was not proximately caused by the safety appliance failure. The decision is correct also be-

cause the testimony shows without dispute that the widow of Lucus did not suffer any pecuniary loss as the result of his death.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PAUL H. RAY
S. J. QUINNEY
Counsel for Respondent
921 Kearns Building,
Salt Lake City, Utah

A. H. NEBEKER
Of Counsel